Norsitah bt Ottoh & Ors v Rosinah bt Nasry & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(W)-1564–08 OF 2017
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND KAMALUDIN MD SAID JJCA
23 OCTOBER 2018

Evidence — Burden of proof — Person who alleged fact had to prove it — Whether High Court wrongly decided case by imposing burden of proving fact on wrong party — Whether respondents by pleading that appellants had not fully paid purchase price for lands had burden of proving that fact — Whether evidence in support of that fact inadmissible as it was wholly based on hearsay evidence — Whether other independent pieces of evidence showed that on balance of probabilities appellants fully paid purchase price — Whether facts and circumstances of case showed that parties transacted for sale of lands for bona fide purpose and not to circumvent any law — Whether transaction not illegal or unlawful

In order to settle outstanding sums that were owing to a bank ('Southern Bank') in respect of certain native charged lands, the respondents, their brother and their late father ('Nasry') entered into an agreement with the first appellant ('A1') in 2001 ('the 2001 agreement') to sell the lands to her for RM317,500 on condition she would settle all monies payable to Southern Bank when the title deeds for the lands were issued. About a week before he died, Nasry allegedly told the respondents that the real buyer of the lands was the third appellant ('A3'), a Japanese national, and that the full purchase price for the lands had not been settled. A3 and the second appellant ('A2') owned the fourth appellant company ('Ramai Aktif'). When the late Nasry's family members refused to deliver the documents of titles to the lands to A1, the latter sued for specific performance of the 2001 agreement. The High Court dismissed A1's suit holding, inter alia, that the 2001 agreement was invalid as neither A1 nor A3 were natives of Sabah and, therefore, were precluded by s 17 of the Sabah Land Ordinance from dealing with any native Sabah land; that A1 at all times acted as A3's nominee and that any transfers and/or subleases of the lands made in favour of Ramai Aktif were equally void. The court also ruled that the full purchase price for the lands had not been paid. Following that decision and since, in the interim, various transfers and/or subleases of the lands had taken place as between the appellants and also as between the respondents and the appellants, the respondents filed a separate suit to declare all such transfers and/or subleases as null and void and for an order that the lands be returned to them. The High Court in this subsequent suit affirmed the findings it had made in A1's suit and declared that the transfers and subleases of the lands were

illegal and null and void and that the full purchase price for the lands had not been paid. The instant appeal was against that decision.

Held, allowing the appeal:

(1) The burden was on the respondents to prove that the balance of the purchase price was not paid by the appellants. They failed to discharge that burden. The High Court had erroneously placed that burden of proof on the appellants and wrongly decided, based on hearsay evidence, that A1 had not paid the full purchase price in accordance with the 2001 agreement (see paras 36, 38–39 & 52).

(2) The cardinal rule was that he who asserted the facts had to prove that those facts existed. It was the respondents who pleaded that the full purchase price had not been paid by the appellants. Therefore, they had to prove the allegation. The evidence of PW1 (the first respondent) in her witness statement was worded exactly the same as para 17 of the respondents' amended statement of claim, ie, that she was told by Nasry that a Japanese man had actually bought the lands and that he had not paid the full purchase price. The respondents relied totally on PW1's said evidence which was hearsay. That was the only evidence before the court and that evidence was inadmissible because the object of the evidence was to establish the truth of what the late Nasry had told PW1 (see paras 37–39 & 41).

(3) The respondents' witness merely alleged non-payment of the purchase price in full but did not know how much remained unpaid or when the loans were repaid. As a result, there was uncertainty whether the full purchase price was paid. There was no proof that the appellants had not paid the purchase price. A3 gave evidence that the full purchase price was paid to Nasry and there was no evidence to rebut this. The High Court judge was clearly wrong in finding, based on hearsay evidence, that the purchase price had not been fully paid. That finding was improbable because the titles of the lands showed that Southern Bank had discharged its charges, which it would not have done if the monies owing to it had not been paid. Also, if the purchase price had not been fully paid, Nasry would have taken legal action to declare the 2001 agreement null and void and the respondents would not have signed agreements to rescind the 2001 agreement and sign fresh sale and purchase agreements ('the SPAs') in 2007. In cl 2 of the 2007 SPAs, the respondents acknowledged having received payment of the full purchase price. Accordingly, the appellants were entitled to rely on ss 91 and 92 of the Evidence Act 1950 to counter the respondents' evidence to contradict or vary the terms of the said cl 2 (see paras 42–45 & 51).

(4) The High Court judge failed to consider that the appellants and the respondents from the very beginning had no intention to advance any

unlawful or illegal purpose. The sale of the lands was to help Nasry settle the loans and not to infringe s 17 of the Sabah Land Ordinance ('the SLO'). When the agreement was signed in 2001, the parties concerned did not know that the lands were under smallholders' scheme or that A1 was not a native of Sabah. Nasry knew that A3 would be able to pay the purchase price to pay off the loans and then pay him the balance. When the High Court held that the 2001 agreement was invalid, the second, third and fourth respondents and their brother rescinded their 2001 agreement with A1 and simultaneously entered into new agreements to sell their lands to four others who were natives of Sabah, thereby rendering the issue of A1 or A2 buying the lands as non-natives as no longer in issue. The fresh agreements signed in 2007 were to complete the agreement reached in 2001 after the loans were settled and the balance was paid to Nasry. As to the High Court's ruling that the subleases of the lands to Ramai Aktif (as nominee of A3) were void for circumventing s 17 of the SLO, s 17(5) of the SLO permitted native land to be subleased to a non-native for a term not exceeding 30 years (see paras 54–63 & 65).

(5) The High Court correctly decided that the respondents' action was not time-barred. The respondents only knew of the illegality of the 2001 agreement when the High Court declared it to be so in 2010. In 2012, they filed the action to nullify the subsequent transfers and the subleases to the appellants. Accordingly, their action was not time-barred (see para 69).

[Bahasa Malaysia summary

Untuk menyelesaikan jumlah tertunggak yang terhutang kepada bank ('Southern Bank') berkenaan dengan tanah anak negeri yang dicagarkan, responden-responden, adik mereka dan arwah bapa mereka ('Nasry') telah membuat perjanjian dengan perayu pertama ('A1') pada tahun 2001 ('perjanjian 2001') untuk menjual tanah kepadanya untuk RM317,500 dengan syarat beliau akan menyelesaikan semua wang yang perlu dibayar kepada Southern Bank apabila surat hak milik tanah dikeluarkan. Kira-kira seminggu sebelum dia meninggal, Nasry didakwa memberitahu responden-responden bahawa pembeli sebenar tanah itu adalah perayu ketiga ('A3'), seorang rakyat Jepun, dan harga pembelian penuh untuk tanah itu belum diselesaikan. A3 dan perayu kedua ('A2') memiliki syarikat perayu keempat ('Ramai Aktif'). Apabila ahli keluarga arwah Nasry menolak untuk menyerahkan dokumen hakmilik tanah kepada A1, pihaknya menyaman untuk pelaksanaan spesifik perjanjian 2001 itu. Mahkamah Tinggi menolak guaman A1 memutuskan, antara lain, perjanjian 2001 itu tidak sah kerana A1 atau A3 bukan anak negeri Sabah dan oleh itu, telah dihalang oleh s 17 Ordinan Tanah Sabah daripada berurusan dengan mana-mana tanah anak negeri Sabah; bahawa A1 pada setiap masa bertindak sebagai penama A3 dan bahawa apa-apa pemindahan dan/atau pajakan kecil dari tanah yang dibuat

memihak kepada Ramai Aktif adalah sama-sama tidak sah. Mahkamah juga memutuskan bahawa harga belian penuh untuk tanah itu belum dibayar. Berikutan dengan keputusan itu dan sejak itu, dalam tempoh interim, pelbagai pemindahan dan/atau pajakan kecil tanah telah berlaku antara perayu-perayu dan juga antara responden-responden dan perayu-perayu, responden-responden memfailkan guaman berasingan untuk mengisytiharkan semua pindahan dan/atau pajakan kecil tersebut sebagai batal dan tidak sah dan untuk perintah bahawa tanah dikembalikan kepada mereka. Mahkamah Tinggi dalam saman berikutnya menegaskan keputusan yang telah dibuat dalam guaman A1 dan menyatakan bahawa pemindahan dan pajakan kecil tanah itu adalah menyalahi undang-undang dan batal dan tidak sah dan harga pembelian penuh untuk tanah itu belum dibayar. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan:

(1) Beban adalah pada responden-responden untuk membuktikan bahawa baki harga pembelian tidak dibayar oleh perayu-perayu. Mereka gagal melepaskan beban tersebut. Mahkamah Tinggi telah terkhilaf meletakkan beban pembuktian terhadap perayu-perayu dan membuat keputusan yang salah, berdasarkan keterangan dengar cakap, bahawa A1 tidak membayar harga belian penuh mengikut perjanjian 2001 (lihat perenggan 36, 38–39 & 52).

(2) Peraturan utama adalah seseorang yang menegaskan fakta-fakta harus membuktikan bahawa fakta tersebut wujud. Responden-responden yang merayu bahawa harga pembelian penuh tidak dibayar oleh perayu. Oleh itu, mereka perlu membuktikan tuduhan tersebut. Keterangan PW1 (responden pertama) dalam kenyataan saksinya telah dikatakan sama seperti perenggan 17 dari kenyataan tuntutan yang dipinda responden-responden, iaitu, beliau diberitahu oleh Nasry bahawa seorang lelaki Jepun sebenarnya telah membeli tanah itu dan bahawa beliau tidak membayar harga belian penuh. Responden-responden bergantung sepenuhnya pada keterangan PW1 yang merupakan dengar cakap. Itulah satu-satunya keterangan di hadapan mahkamah dan keterangan itu tidak boleh diterima kerana tujuan keterangan adalah untuk membuktikan kebenaran apa yang telah diberitahu arwah Nasry kepada PW1 (lihat perenggan 37–39 & 41).

(3) Saksi responden-responden hanya mendakwa ketidakbayaran harga pembelian penuh tetapi tidak tahu berapa banyak yang masih belum dibayar atau bila pinjaman itu dibayar balik. Akibatnya, terdapat ketidakpastian sama ada harga pembelian penuh telah dibayar. Tiada bukti bahawa perayu tidak membayar harga belian. A3 memberi keterangan bahawa harga pembelian penuh telah dibayar kepada Nasry dan tidak ada keterangan untuk menyangkalnya. Hakim Mahkamah

Tinggi jelas salah dalam memutuskan, berdasarkan keterangan dengar cakap, bahawa harga pembelian belum dibayar penuh. Penemuan itu tidak mustahil kerana hak milik tanah menunjukkan bahawa Southern Bank telah melepaskan gadaiannya, yang tidak akan dilakukan jika wang yang terhutang kepadanya tidak dibayar. Selain itu, jika harga belian belum dibayar penuh, Nasry akan mengambil tindakan undang-undang untuk mengisytiharkan perjanjian 2001 batal dan tidak sah dan responden-responden tidak akan menandatangani perjanjian untuk membatalkan perjanjian 2001 dan menandatangani perjanjian jual beli baru ('PJB') pada tahun 2007. Dalam klausa 2 PJB 2007, responden-responden mengakui telah menerima bayaran harga penuh pembelian. Oleh itu, perayu-perayu berhak untuk bergantung pada ss 91 dan 92 Akta Keterangan 1950 untuk menentang keterangan responden-responden untuk membantah atau mengubah terma-terma klausa 2 tersebut (lihat perenggan 42–45 & 51).

(4) Hakim Mahkamah Tinggi gagal untuk mempertimbangkan bahawa perayu-perayu dan responden-responden dari awal tidak mempunyai niat untuk melanjutkan sebarang tujuan yang menyalahi undang-undang atau haram. Penjualan tanah itu adalah untuk membantu Nasry menyelesaikan pinjaman dan bukan untuk melanggar s 17 Ordinan Tanah Sabah ('SLO'). Apabila perjanjian ditandatangani pada tahun 2001, pihak-pihak yang berkenaan tidak tahu bahawa tanah itu berada di bawah skim pekebun kecil atau bahawa A1 bukan anak negeri Sabah. Nasry tahu bahawa A3 akan dapat membayar harga belian untuk membayar pinjaman dan kemudian membayar baki kepada beliau. Apabila Mahkamah Tinggi memutuskan bahawa perjanjian 2001 itu tidak sah, responden kedua, ketiga dan keempat dan adik mereka membatalkan perjanjian 2001 mereka dengan A1 dan pada masa yang sama memeterai perjanjian baru untuk menjual tanah mereka kepada empat orang lain yang berasal dari Sabah, dengan itu menjadikan isu A1 atau A2 membeli tanah sebagai bukan anak negeri bukan lagi isu. Perjanjian baru yang ditandatangani pada 2007 adalah untuk menyelesaikan perjanjian yang dicapai pada 2001 setelah pinjaman diselesaikan dan baki dibayar kepada Nasry. Mengenai keputusan Mahkamah Tinggi bahawa pajakan kecil tanah kepada Ramai Aktif (sebagai penama A3) adalah tidak sah untuk mengelakkan s 17 SLO, s 17(5) SLO membenarkan tanah anak negeri untuk dipajak kecil kepada bukan anak negeri untuk tempoh tidak melebihi 30 tahun (lihat perenggan 54–63 & 65).

(5) Mahkamah Tinggi dengan betul memutuskan bahawa tindakan responden-responden tidak dihalang masa. Responden-responden hanya mengetahui tentang ketaksahan perjanjian 2001 apabila Mahkamah Tinggi mengisytiharkan ianya begitu pada tahun 2010. Pada tahun 2012, mereka memfailkan tindakan itu untuk membatalkan

A pemindahan seterusnya dan pajakan kecil kepada perayu. Oleh itu, tindakan mereka tidak dihalang masa (lihat perenggan 69).]

Notes

B For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 943–957.

Cases referred to

Alliance Bank Malaysia Bhd v Sail bin Yalang [2010] 7 MLJ 316, HC (refd)
C *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2011] MLJU 1479; [2011] 7 CLJ 909, FC (refd)
Everett v Griffiths [1924] 1 KB 941, KBD (refd)
Hubah Sdn Bhd and ors v Koperasi Pusaka (Penampang) Berhad and Ors [2011] MLJU 230 (refd)
D *KTS Sdn Bhd v Standard Chartered Bank* [2004] MLJU 761; [2004] 2 CLJ 85, CA (refd)
Leong Hong Khie v Public Prosecutor [1986] 2 MLJ 206, FC (refd)
MBf Finance Bhd v Low Achee & Anor [2011] 7 MLJ 621, HC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)
E *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421; [1995] 2 CLJ 846, HC (refd)
Teper v R [1952] AC 480, PC (refd)
Trawnik and another v Ministry of Defence [1984] 2 All ER 791, Ch D (refd)

F **Legislation referred to**

Companies Act 1965 s 133
Evidence Act 1950 ss 91, 92
Rules of the High Court 1980 O 15 r 16
G Sabah Land Ordinance (Cap 68) ss 17, 17(5), 64

Appeal from: Civil Suit No SDK-11–8/2 of 2012 (High Court, Sandakan)

Edwin Tsen (Tan Pang Tsen & Co) for the appellants.
Rizwandean M Borhan (Yusri & Rizwan) for the respondent.

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Kamaludin Md Said JCA:

INTRODUCTION

I **[1]** The first to fourth appellants'/defendants (Norsitah bt Ottoh, Rose Lee Lie Mi, Yoshiyuki Kawagoe, Ramai Aktif Sdn Bhd) and seventh to tenth appellants'/defendants, (Surianah bt Duangsa, Karmat bin Salamat, Rodey bin Saini and Siti Halimah bt Salamat) appealed against the decision of the judicial commissioner, YA Datuk Douglas Cristo Primus Sikayun (as he then was) of

the High Court at Sandakan, Sabah via the notice of appeal dated 7 July 2017. The notice of appeal states that the appeal is against:

(a) the whole decision given on 22 July 2014 in allowing the respondents'/plaintiffs' claim in prayers No 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the amended statement of claim against appellants/defendants /first to fourth and seventh to tenth with costs of RM40,000; and

(b) the whole of supplementary grounds decision given at Sandakan on 12 June 2017 as directed by an order of the Court of Appeal dated 19 November 2016 in deciding that the full purchase price of the said lands have not been paid;

[2] At the High Court the plaintiffs (Rosinah, Rahah, Razimah and Rahimah bt Nasry) via their writ and amended statement of claim dated 7 March 2012 prayed that amongst others, declaration that the second defendant (Rose Lee Lei Mee) is not a native of Sabah and the native certificate is fraudulent, declaration that sale and purchase agreement dated 25 October 2007 between plaintiffs and defendants are terminated/illegal/null/void, and orders for the return of titles.

[3] On 22 July 2014, the High Court, among others, declared that the sale and purchase agreement dated 25 October 2007 is terminated, ordered that the transfer of land be revoked and cancelled, and defendants to pay costs of RM40,000 to the plaintiffs. The High Court granted the plaintiffs' prayers 4–18 in their amended statement of claim as follows:

(a) a declaration that the sale and purchase agreement dated 25 October 2007 between the second plaintiff and the eight defendant is terminated and/or illegal and null and void;

(b) an order for the transfer of NT093110439 from the second plaintiff to the eight defendant and the sublease of NT093110439 from eight to fourth defendant be revoked cancelled and set aside;

(c) a declaration that the sale and purchase agreement dated 25 October 2007 between the fourth plaintiff and the ninth defendant is terminated and/or illegal and null and void;

(d) an order that the transfer of NT093110457 from the fourth plaintiff to the ninth defendant and the sublease of NT093110457 from ninth defendant to the fourth defendant be revoked cancelled and set aside;

(e) a declaration that the sale and purchase agreement dated 25 October 2007 between the third plaintiff and the tenth defendant is terminated and/or illegal and null and void;

A (f) an order that the transfer of NT093110448 from the third plaintiff to the tenth defendant and the sublease of NT093110448 from the tenth defendant to the fourth defendant be revoked cancelled and set aside;

(g) an order that the transfer of NT093110411 from Nasry bin Yahya to the
B first defendant, the subsequent transfer from the first defendant and the sublease from seventh defendant to the fourth defendant be revoked cancelled and set aside;

(h) an order that the transfer of NT0933020994 ('Land A') from the second plaintiff to the second defendant and the subsequent transfer to the fifth
C defendant is null and void and be cancelled;

(i) that the sublease of Land A to the fourth defendant be cancelled and set aside;

(j) that the transfer of NT0933021017 ('Land C') from the fourth plaintiff
D to the first defendant and the subsequent transfer to the sixth defendant is null and void and be cancelled;

(k) that the sublease of Land C to the fourth defendant be cancelled and set aside;

E (l) an order that the eleventh defendant to expunge from records the above transfers and subleases;

(m) an order for Land A, Land C, and NT093110411, NT093110439, NT093110457 and NT093110448 to be transferred to the plaintiffs;

F (n) an order for the defendants to return land titles to Land A, Land C, and NT093110411, NT093110439, NT093110457 and NT093110448 to the eleventh defendant to carry out the above orders; and

(o) an order to restraint the defendants by themselves or their agent or
G servants or workers or anyone else claiming a right or interest or title thereunder from entering, attempting to enter, remaining, occupying or interfering with the plaintiffs' possession and cultivating of Land A, Land C, and NT093110411, NT093110439, NT093110457 and NT093110448.

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[4] Aggrieved by that decision, the defendants appealed to the Court of Appeal via Appeal No S-02–1479–08 of 2014. The Court of Appeal heard the appeal on 18 November 2016 and by consent of parties, struck out the appeal with no order as to cost and decided that:

I (a) right of parties to appeal are preserved;

(b) the matter is to be remitted back to High Court Sandakan on question of whether the relevant defendants have paid the full purchase price for the six parcels of land;

(c) no further evidence is to be called;

(d) parties are at liberty to file submissions; and

(e) deposits to be refunded to the appellants (defendants).

[5] When the matter was remitted back to High Court, the High Court judge via his supplementary ground of decisions dated 12 June 2017 explained his findings regarding the issue of the purchase price of the land. He decided that the full purchase price of the said lands have not been paid by the first defendant to late Nasry.

[6] Aggrieved with the decision, the defendants appeal to this Court of Appeal via Appeal No S-02(W)-1564–08 of 2017.

BRIEF FACTS OF THE CASE

[7] The defendants are natives of Sabah from Sungai community in Kinabatangan and daughters of the late Nasry bin Yahya.

[8] The fourth plaintiff is a company ('Ramai Aktif') and has two shareholders namely the second and third defendant. The third defendant is a Japanese national.

[9] The late Nasry owned three pieces of land in Kinabatangan whereby NT093020994 was transferred to the second defendant on 18 April 2005. NT093021017 was transferred to the late Nasry's wife, Halimah on 20 December 1993 and NT093021008 was transferred to fourth plaintiff on 20 December 1993 and these three pieces of land subsequently charged to Southern Bank for a total of RM310,000.

[10] Sometimes in 1998, the late Nasry, the plaintiffs and their brothers applied these lands measuring an area approximately 121.31 acres more or less in total and these seven pieces of land applies by them and were issued with title deeds with several names on each pieces of land.

[11] Sometime in 2001, the late Nasry told the first defendant that he had financial difficulties and he wanted to charge the six pieces of lands. The third defendant approached and entered negotiations with the late Nasry to purchase seven pieces of lands and on 27 June 2001 the plaintiffs together with their brother and the late Nasry entered into a sale and purchase agreement with the first defendant to sell the seven pieces of lands with a purchase price of RM317,500 and under cl 2(c) of the agreement, the outstanding loan to Southern Bank Bhd was RM254,000 and this will be paid by the first defendant to the said bank upon the issuance of the title deeds.

[12] However, one piece of land under NT093110439 registered in the name of Rahah bt Nasry was able to be transferred into the name of the first defendant as the lands which the late Nasry and his family had sold under the small holders scheme and the rest of the lands could not be transferred into the name of the first defendant.

[13] The late Nasry passed away on 26 April 2005 and before his death he told the respondents that Kawagoe; the third defendant was the one who actually bought the said lands and has not paid the full purchase price.

[14] The rest of the late Nasry's family members refused to deliver the documents of titles of the lands to the first defendant, the first defendant then filed a suit against the plaintiffs, Ruhaya bt Nasry and Azman @ Aman bin Nasry for specific performance for the sale and purchase agreement dated 27 June 2001 and to transfer the ownership of the lands. The first defendant obtained judgment in default against second, third and fourth plaintiffs. The first plaintiff and Ruhaya bt Nasry disputed the suit and filed defence.

[15] However, three months after the first defendant had commenced the 2007 suit, the second, third and fourth plaintiffs and their brother Azman had all signed their respective rescission of agreements with the first defendant and entered into fresh sales agreement.

[16] After a full trial of the 2007 suit, the High Court Sandakan dismissed the first defendant's 2007 suit with costs on 19 February 2010 and YA Clement Skinner J (as he then was) amongst others found that:

(a) the first defendant, Norsitah bt Ottoh is not a native of Sabah and she was the nominee of Kawagoe;

(b) as the land was still under application, and as the title had not been issued or registered, the fifth and seventh defendants Jorberey bin Jukil and Surianah bt Duangsa could not in law have sold any interest in the lands to the defendants as plaintiffs;

(c) the loan by Ramai Aktif to the first defendant was contrary to s 133 of the Companies Act 1965;

(d) that the power of attorney from the fifth and seventh defendants was null and void due to illegality;

(e) the fifth and seventh defendants not entitled to damages; and

(f) the sale and purchase agreement dated 27 June 2001 is invalid and shall not be recognised by the court.

[17] After judgment delivered, the third, fourth and sixth defendants in suit

2007 applied for default judgement entered against them on 11 December 2007 to be set aside and it was granted and the court ordered the plaintiff in 2007 to filed notice of discontinuation against the third, fourth and sixth defendants.

[18] The plaintiffs filed this action against the defendants claiming for several orders amongst others that the transfer of lands and sub leases involving six native titles be declared null, void, revoked or cancelled.

[19] There are three pieces of lands (NT09311049, NT093110448 and NT093110457 which were sold by the second, third and fourth plaintiffs to the eighth, ninth and tenth defendant vide sales and purchases agreement dated 25 October 2007. The eight, ninth and tenth defendant became the registered owner of these lands on 19 November 2007. They had executed memorandum of sublease dated 23 January 2008 respectively to sublease the three pieces of lands to Ramai Aktif.

[20] The other three lands involved the transfers and subleases are as follows:

(a) NT093021017

This land was transferred from the fourth plaintiff to the first defendant on 25 September 2002 based on the sales and purchase agreement dated 27 June 2001. On 9 December 2010, the first defendant transferred the said land to the sixth defendant;

(b) NT093110411

The first defendant transferred this land into her own name on 8 January 2008. Entered another sales and purchase agreement dated 25 February 2008 and transferred to the seventh defendant on 3 April 2008. The seventh defendant subleased to Ramai Aktif dated 25 April 2008; and

(c) NT093020994

On 18 April 2005 this land was transferred to second plaintiff and later transferred to second defendant then second defendant transferred to fifth defendant on 29 October 2010. The said land was subleased to Ramai Aktif.

DECISION OF THE HIGH COURT JUDGE

[21] In respect of the said six lands, the learned judge in his judgment dated 22 July 2014, held that the transfer of the six native lands were illegal, null and void on the grounds that the first defendant is not a native of Sabah and these native lands were actually purchased by Kawagoe, Japanese national who is not allowed under the law to deal in the native lands. The defendants were held to be the nominees of Kawagoe and to sublease the native lands to Ramai Aktif to

circumvent s 17 of the Sabah Land Ordinance which prohibits non-native to deal with the native land. Therefore, the subsequent transfer to other defendants and the sublease to Ramai Aktif is also void and be cancelled and set aside.

[22] The learned judge also relied on the decision of the High Court of Sandakan, where Clement Skinner J (as he was then) on 19 February 2010 dismissed the first defendant's 2007 suit on reason that the first defendant, Norsitah bt Ottoh is not a native of Sabah and she was the nominee of Kawagoe. The Sandakan High Court also ruled that the first defendant was merely a nominee for Kawagoe to circumvent the provision of s 17 of the Sabah Land Ordinance prohibiting non-native to deal with native land.

[23] As directed by an order of the Court of Appeal dated 18 November 2016 for the High Court determine the issue whether the full purchase price of the said lands have not been paid by the defendants, in the supplementary grounds dated 12 June 2017, the learned judge had besides repeating his finding that the transfers of the six native lands and the subsequent transfers and sublease to Ramai Aktif were illegal, made a finding that the full purchase price of the said lands have not been paid by the first defendant to late Nasry.

[24] The learned counsel for the defendants had submitted that the said sale and purchase agreement that the second to fourth plaintiffs had signed are contracts which had been reduced to writing and pursuant to s 92 of the Evidence Act 1950, the plaintiffs' evidence on non-receipt of the purchase price are to contradict or vary the terms in cl 2 of the sale and purchase agreements are clearly not admissible in evidence and should not be considered at all.

[25] However, the learned judge rejected learned counsel' argument and ruled that there are exceptions to the rule in s 92 of the Evidence Act 1950 and because the court had found that the defendants are nominees of the third defendant and the transfers were illegal, it is clear that this case fell into the exception and ss 91 and 92 of the Evidence Act 1950 do not apply in this case.

[26] The learned judge also held that there is no evidence that the first defendant had paid the full purchase price to the second plaintiff in accordance with the invalid agreement dated 27 June 2001. There is also no evidence to show that the eight defendant had paid the full purchase price to the second plaintiff and no evidence that actual money changed hands and the full purchase price was paid by the first or the eight defendant to the second plaintiff.

[27] The learned judge stated that it is a trite law that he who asserts must prove. In this case, if indeed it was true that the defendants have paid in full

purchase price to the late Nasry, the defendants should have documentary evidence to support and the court did not see such documentary evidence.

[28] He also ruled that the plaintiffs' claim are not caught by the limitation under the Sabah Land Ordinance. The learned judge referred to the decision of David Wong J (as he then was) in the case of *Hubah Sdn Bhd and ors v Koperasi Pusaka (Penampang) Berhad and Ors* [2011] MLJU 230 on limitation vis a vis void and illegal contract. A void contract generates neither right nor duty to be enforced in a court of law. The issue of period limitation cannot thus be invoked where there is no right.

[29] In conclusion, the court is satisfied that on the balance of probability that the full purchase price of the said lands have not been paid by the first defendant to late Nasry. The court allows the plaintiffs' claim of their amended statement of claim with costs of RM40,000 against the first, second, third, fourth, eight, ninth and tenth defendants.

THIS APPEAL

[30] The defendants who are the appellants in this appeal had listed several grounds in their memorandum of appeal dated 25 August 2017. They have also filed in their written submissions. The respondents who are the plaintiffs had also filed in their reply to the submissions. We heard the appeal on 19 July 2018.

[31] There were five issues raised by the appellants in this appeal where the appellant contended that the learned judge failed to consider therefore, had made an erroneous finding. The issues raised and to be decided by this court are as follows:

(a) was the purchase price paid to the late Nasry under the 2001 agreement and therefore the respondents have no locus standi to interfere with the affairs of the appellants;

(b) was the agreement reached between the late Nasry and the third defendant for an illegal purpose to intentionally breached s 17 of the Land Ordinance?

(c) are the respondents entitled to the declarations as they did not come to court with clean hands;

(d) are the respondents claim statute barred? and

(e) are the respondents parties to an illegal transaction and therefore the loss lies where it falls?

[32] Having heard the oral submissions from the appellants' and

respondents' counsels and read the records of appeal, the grounds of decisions (the main decision and the supplementary decision) by the learned judge and considered their written submissions filed herein, we found there is merit in the appellants' appeal and our decision is unanimous that the appellants' appeal is allowed with costs of RM55,000 subject to the payment of allocator fee and deposits to be refunded to the appellant.

DECISION OF THIS COURT

[33] We would addressed the issues accordingly.

Was the purchase price paid to the late Nasry under the 2001 agreement

[34] The appellants submitted that the full price was already paid to the late Nasry. We heard the full submissions on this issue with the points to support the argument. In summary, what the appellants were submitting is that the learned judge had misdirected himself in fact and in law and his decision is erroneous on ground that the finding that the first appellant or the eighth appellant had not paid the purchase price to the second plaintiff was based on hearsay evidence. It was the appellant's case that the respondents were relying on hearsay evidence. On point of law he submitted that hearsay evidence cannot be accepted by the court as the truth. The burden is on the respondents to prove that the balance of the purchase price was never paid. They have failed to do so as they had relied on 'hearsay' evidence and the improbability that the balance of the purchase price was never paid. Without the payment of the purchase price, the loans would not have been settled.

[35] The learned judge in his supplementary grounds of decision held that there is no evidence that the first appellant had paid the full purchase price to the second respondent in accordance with the invalid agreement dated 27 June 2001. There is also no evidence to show that the eight appellant had paid the full purchase price to the second respondent and no evidence that actual money changed hands and the full purchase price was paid by the first or the eighth appellant to the second respondent.

[36] We had considered the appellants points of submission and we agreed with the appellants that there is an appealable error in the learned judge's decision because he had made his finding based on the hearsay evidence of the respondents' witness. The respondents witness PW1-WS, Rosinah bt Nasry had testified that each of them received RM2,000 and that before the late Nasry passed away in April 2005, *their late father had informed them that the purchase price had not been paid in full.*

[37] Her evidence at pp 411–412 of record of appeal (AR) (Vol 2B) (TAB

Core Bundle) stated as follows:

Q&A

5. What happened after that?

5.1 Sometimes in 2001, the late Nasry had some financial difficulties and he told me that he wanted to charge the said Lands. At that time, the title deeds to the said Lands had not been issued by the Government. As far as I can recall, the late Nasry did not say that he wanted to sell the said Lands. He only wanted to charge the said Lands.

6. What happened after that?

6.1 I remembered going to a lawyer's office and signing some documents purportedly to charge the said Lands. I cannot speak, read nor write English. I did not understand the documents that I signed. If I remember correctly, each of us received RM 2,000 after signing the said documents. Later on I came to know that the document that we all signed was a Sale and Purchase Agreement dated 27th June 2001 between the late Nasry, and my siblings and one Norsitah bt Ottoh. This Agreement is at pg 15 of the plaintiffs' Bundle of Documents. Norsitah bt Ottoh is the first defendant in this case.

7. What happened next?

7.1 The late Nasry died in April 2005. However, about one week before he died, I went to visit my farther at his house in Taman Utama, Sandakan. *He told me that a Japanese man had actually bought the said Lands and that he has not paid the full purchase price. I was very suprised when he told me this because all this while I thought the said Lands were only charged but not sold. He also said that this Japanese man had cheated him because he did not pay the full purchase price for the said Lands.* My farther also told me that this Japanese man had used the first defendant's name (Norsitah bt Ottoh) to buy the said Lands.

[38] We noted that the evidence by PW1 in her witness statement above is worded exactly with the respondents pleading at para 17 of their amended statement of claim. This is the respondents' pleaded case and we agreed with the appellants that the burden is on the respondents to prove that the balance of the purchase price of the said Lands was never paid by the appellants. In this case the learned judge referred to cl 2 of the sales and purchase agreement dated 25 October 2007 between the second respondent and the eighth appellants which says the purchase price only shall be paid by the purchaser to the vendor upon signing of the agreement in one lump sum (the receipt of whereof is hereby acknowledge by the vendor) however, ruled that it is the first appellants who failed to provide evidence that the first appellant had paid the full purchase price to the second respondent and as far as the court is concerned, there is no evidence that actual money changed hands and the full purchase price was paid by the first or the eighth appellant to the second respondent. Similarly, it was also held that there is no evidence that the full purchase price had been paid by the appellants to other respondents in respect of other lands (ground of

judgment at pp 65–67 in AR (Vol 1). In other words, the burden rests on the appellants to prove it instead of the respondents.

[39] We think that the learned judge had made a grave error because the cardinal rule is that he who asserts the facts must prove those facts exist. It is the respondents who pleaded that the full purchase price had not been paid by the appellants, therefore, they must prove it. In *Alliance Bank Malaysia Bhd v Sail bin Yalang* [2010] 7 MLJ 316 the court held that:

> There can be no dispute that the respondent's liability depends on the existence of the appellant's assertion that he executed the second letter of guarantee. Clearly therefore the burden of proof lies on the appellant by virtue of s 101 of the Act which provides:
>
> 101 Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[40] In the case of *MBf Finance Bhd v Low Achee & Anor* [2011] 7 MLJ 621, the court held as follows:

> It is elementary that the party who asserts the existence of facts upon which judgment should be given to him must prove the existence of those facts (see s 101 of the Evidence Act 1950). Further, s 103 of the Evidence Act provides that unless it is provided by any law that the burden of proof of a particular fact lies with a particular person, then the burden of proof lies with the person wishing the court to believe in the existence of that particular fact.

[41] We agreed with the appellants that the respondents failed to provide evidence that the appellants had not paid the full purchase price. The respondents totally relied on PW1's evidence which was the reproduction of para 17 of their amended statement of claim. Be that as it may, PW 1's evidence is a 'hearsay' evidence as the respondents clearly stated in their witness statements that they were informed by their late father that the purchase price was not fully paid. This was the only evidence before the court and in our view the evidence cannot be accepted by the court or inadmissible because the object of the evidence is to establish the truth of what her late father had told her. The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person (see *Leong Hong Khie v Public Prosecutor* [1986] 2 MLJ 206). The Federal Court quoted the passage in Lord Normand in *Teper v R* [1952] AC 480 at p 486 which held that:

> The rule against the admission of hearsay evidence is fundamental. It is not the

> best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanor would throw on his testimony is lost.

In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in section 32 of the Evidence Act 1950.

In the early part of its opinion the Privy Council said:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the witness, not the truth of the statement, but the fact that it was made.

This statement has been accepted by the Privy Council in *Mawaz Khan v The Queen* [1967] 1 AC 454 and *Ratten v The Queen* [1972] AC 378. In *Ratten* case Lord Wilberforce said at p 387:

> A question of hearsay only arises when the words spoken are relied on testimonials, ie as establishing some facts narrated by the words.

[42] We are also of the view that the respondents' witness did not know when loans were repaid and how much was still owing to their late father. The witness merely alleged nonpayment in full but produce no evidence to show how much was unpaid to their late father. The witness did not know what was the balance which was left unpaid and therefore they were not telling the truth. The respondents' witness had no knowledge about the matter. In the result, there was uncertainty whether the full purchase price had been paid. There is no prove that the purchase price had not been paid by the appellants. The learned judge based on the hearsay evidence that the full purchase price had not be paid. On the contrary the third appellant (Yoshiyuki Kawagoe) had given evidence that the full purchase price was paid to Respondents' late father and there was no evidence to rebut this. He was not challenged under cross examination.

[43] It is our view that the learned judge finding was clearly wrong. It is improbable for the purchase price not have been paid as if it was not, the late Nasry would have taken legal action to declare the 2001 agreement null and void. Also, if the late Nasry was not paid the purchase price in full, the respondents would not have signed the rescission agreements and the sales agreements ie the fresh document and could have refused to sign them.

[44] Our perusal of the documents at pp 493 and 500 AR (Vol 2B) (TAB 5

and 7 Core Bundles) which are the native titles we found the endorsement in the titles had written the words 'Satisfaction of Charge by Southern Bank Berhad'. It was a discharge of charge by Southern Bank. The loans from the bank were settled before February 2003 and the discharge was registered on 18 February 2003. We agreed with the appellants that without paying the bank, the charge would not be satisfied. The other titles were registered on July 2007 and March 2008 (pp 502, 505, 508, 511, 513, 516 AR Vol 2B).

[45] The appellants' submission make sense that if the full purchase price had not been paid, the respondents and their family had never mentioned the alleged nonpayment of the purchase price in their agreement dated 14 February 2007 (the agreement is at pp 764–771 AR (Vol 2C) (TAB 23 Core Bundle). The 2007 agreements signed specifically stated that the purchase price had been paid in full to them and they had duly acknowledged receipt (cl 2 of the 2007 agreement at p 611 AR (Vol 2C) (TAB 18 Core Bundle). It was submitted that the six family members had agreed to rescind the 2001 agreement and signed fresh agreements in 2007 with the appellants and also received RM15,000 for signing the fresh documents and also to hand over the documents of titles to enable the appellant to register the transfers to the appellants and subsequently subleases to Ramai Aktif (Q&A 9.2 of PW2-WS p 430 AR (Vol 2B) (TAB 3 CB).

[46] The family members had never mentioned that there was any part of the purchase price not paid when they agreed among themselves to take action against the first and second appellants in writing dated 14 February 2007 to recover the lands as they had found out that the first and second appellant were not natives of Sabah. Besides that, not all the family members joined in this legal action. Only three of the family members have taken this action against the appellants and other family members did not include their names as parties to this action

[47] As to the issue of s 92 of the Evidence Act 1950, the appellants had submitted that the sale and purchase that the second to fourth respondents had signed the contracts which had been reduced in writing and pursuant to s 92, the respondents' evidence on non-receipt of the purchase price are to contradict or vary the terms in cl 2 of the sale and purchase agreements, are clearly not admissible in evidence and should not be considered at all. However, the learned judge did not agree with the appellants and ruled that since he had found that the transfers of the said lands to the first appellant are illegal, the respondents' case fall into the exception in s 92 that whatever oral evidence to show illegality including evidence that the full purchase price was never paid may be admitted. The learned judge held that ss 91 and 92 of the Evidence Act 1950 do not apply in this case.

[48] The exception in s 92 says as follows: A

> Provided that —
>
> (a) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law. B

[49] In our view, the learned judge had missed the point. This exclusionary provisions of s 92 of the Evidence Act is applicable only in respect of an attempt C to contradict the evidence found in the documents establishing the contractual relationship between the contracting parties to the written agreements entered into between the appellant and the respondent but its introduction was purely for purpose of establishing the existence of an independent oral contract (see Abdul Kadir Sulaiman JCA in *KTS Sdn Bhd v Standard Chartered Bank* [2004] D MLJU 761; [2004] 2 CLJ 85).

[50] The issue before the learned judge is all about the claim of nonpayment of the full purchase price of the said lands by the respondents against the appellants. As alluded to earlier this claim was pleaded in para 17 of the E respondents' amended statement of claim. The pleaded facts were reproduced as testimonies of PW1 for the respondents. The evidence by PW1 is to show that the full purchase price had not been paid by the appellant. It may be argued that this fact would invalidate any document on ground of want or failure of consideration under the exception. However, in this case the issue is F not whether the agreement is invalid because the nonpayment of the purchase price ie want or failure of consideration but it is solely on the issue whether the full purchase price had been paid. Therefore, In our view, the exception under s 92 does not apply. Similarly, the respondents' pleaded case on the issue of non-payment is not to prove that the agreement is illegal. The learned judge G found that the transfers of the said land to the first appellant who are the nominees of the third appellant is illegal. It is not related to the non-payment of the full purchase price which made the agreement illegal. It can be clearly seen at the last paragraph of the learned judge's decision dated 12 June 2017 when he clearly said that he was satisfied that on the balance of probability that H the full purchase price of the said lands have not been paid by the first defendant/appellant to late Nasry. Therefore, the exception under s 92 also does not apply.

[51] Be that as it may, the respondents could not rely on the exception of s 92 I of the Evidence Act 1950 as their evidence was hearsay evidence. They had testified that they were informed by their late father that there was an outstanding balance not paid but could not say how much was still unpaid. In the result, there is no evidence except this piece of hearsay evidence which is

A inadmissible for the respondents to prove that the full purchase price had not been paid by the appellants. In that circumstances, in our view, the appellants could rely on ss 91 and 92 of the Evidence Act 1950 that the second to fourth respondents had signed the sale and purchase which had been reduced in writing and the respondents' evidence on non-receipt of the purchase price
B would contradict or vary the terms in cl 2 of the sale and purchase agreements. In other words, the purchase price had been paid in full by the appellants to the respondents and they had duly acknowledged receipt of the payments.

C **[52]** The burden is on the respondents to prove that the balance of the purchase price was never paid. They had failed to do so therefore, it is our view that the decision by the learned judge that first appellant had not paid the full purchase price to the second respondent in accordance with the agreement dated 27 June 2001 is based on hearsay evidence and is erroneous which
D allowed us to intervene.

Was the agreement reached between the late Nasry and the third defendant (appellant) for an illegal purpose to intentionally breached s 17 of the Land Ordinance?

E

[53] The appellants submitted that the learned judge erred to find that the agreement dated 27 June 2001 was for an illegal purpose. The learned judge had found that it was because the lands could not all be transferred into the name of the first appellant and fresh agreements have to be signed with separate
F persons. The lands are all registered into the natives of Sabah. The learned judge also found that it was the third appellant who had come out with the money to pay the bank.

[54] We had considered the appellant submission on this point. It was not a
G disputable fact that the late Nasry owed the bank RM360,000 and had to sell the lands charged and also land under applications to the first appellant for the price of RM317,500 in 2001. No one knew that the land were under small holders scheme and none of the parties knew that the first appellant was not a native of Sabah either when the agreement was signed in 2001 with the
H respondents' family members. The late Nasry knew that the third appellant would be able to pay the purchase price to pay off the loans and the balance to be paid to the late Nasry.

[55] The learned judge had earlier on found that the said lands cannot be
I sold to the first appellant being a non-native of Sabah and as a nominee of Kawagoe, the third appellant. He agreed with the decision of Clement Skinner J 19 February 2010, which had ruled that the sale and purchase agreement dated 27 June 2001 is invalid and shall not be recognised by the court. The High Court judge had also ruled that the first appellant was merely

a nominee of Kawagoe to circumvent the provision of s 17 of the Sabah Land Ordinance prohibiting non-native to deal with the native land.

[56] The appellants did not appeal against the decision by Clement Skinner J. There is no record to show notice of appeal was filed. The facts remains that the transfer of the said lands to the first appellant, Norsitah bt Ottoh under the sales and purchase agreement dated 27 June 2001 is illegal because the first appellant is non-native of Sabah. In consequence of the decision of Clement Skinner J, the second, third, fourth respondents and his brother entered into the rescission agreement with the first appellant on 25 October 2007 to rescind the 2001 agreement and simultaneously entered with a new sales and purchase agreement on the same day. Clement Skinner J's decision it was said as follows:

> However after the commencement of this suit the second, third, fourth and sixth defendants have delivered the titles deeds to their respective land to the plaintiff who in turn requested them to enter into Recession Agreement (of the said agreement) and Agreement dated 25 October 2007 to sell their respective lands to new purchasers, namely Lee bin Duangsa, Karmat bin Salamat, Siti Halimah bt Selamat and Rodey bin Sairi in place of the plaintiff. The lands belonging to the second, third, fourthand sixth defendant have consequently been transferred to these four (4) later names. The evidence shows that they have in turn leased their land to Ramai Aktif for 30 years.

[57] The learned judge adopted the finding of Clement Skinner J however, despite holding that the transfers of lands to the defendants were illegal, the learned judge went one step ahead by making a further order that the sub-lease to Ramai Aktif be cancelled and set aside. This is because the learned judge had found that Ramai Aktif was the nominee of the third appellant and the illegality of the transfers is extended to the subsequent transfers and the subleases which were also illegal in contravention with s 17 of the Sabah Land Ordinance.

[58] In the present case, it is not disputed that all the said lands had been transferred and registered into the names of the respondents who are the natives of Sabah. The issue of the first appellant or the second appellant are non-native purchasing the lands are not in issue anymore and overtaken by the rescission agreement and the fresh sales and purchase agreement dated 25 October 2007. Our view is that it was a separate matter. The current situation is that the respondents had subleased the lands to Ramai Aktif.

[59] The learned judge had held that the sublease was also void and be cancelled and set aside because it circumvents s 17 of the Sabah Land Ordinance which prohibits non-native to deal with the land. Assuming the learned judge was right in his finding that Ramai Aktif is the nominee of the

A third appellant (Kawagoe) who is non-native, the issue is whether the subleases of the land are prohibited under s 17 of the Sabah Land Ordinance.

[60] Section 17(5) of the Sabah Land Ordinance provides as follows:

B 17 Sublease of Native Title to Non-Native

(5) Notwithstanding the provisions of this section 64, it shall be lawful for the owner of land held under the provisions of Part IV to grant a sublease of such land to a non-native for a term not exceeding thirty years.

C **[61]** Section 64 of the Sabah Land Ordinance provides as follows:

64(1) This Part shall apply only to lands held by natives, and non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.

D

[62] We agreed with the appellant submission that the creation of sublease under native title allowed for a term of 30 years under s 17(5) of the Sabah Land Ordinance and it allows the lending of money to a native to buy the lands and sublease to non-native. The late Nasry owed the bank RM360,000 and had to E sell the lands charged and also land under applications to the first appellant for the price of RM317,500 in 2001. We found there is no difference in borrowing money from a bank as native title can be charged.

[63] The fresh agreements signed in 2007 were to complete the agreement F reached in 2001 after the loans were settled and the balance paid to the plaintiffs' late father. All the legal documents were done by a law firm and the parties were never intended that it was for an illegal purpose. The law firm did not advise the parties this would be infringing s 17 of the Sabah Land Ordinance. The consideration had been paid in full to their late father to G mainly settle the loans. In the circumstances, we agreed with the appellant that the agreement was merely for the purpose to help the late Nasry to settle the loan and not for any illegal purpose. The learned judge failed to consider these all together and hence a miscarriage of justice is caused to the appellants.

H **[64]** In *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2011] MLJU 1479; [2011] 7 CLJ 909 the Federal Court held that:

[26] It was also argued for the appellants that the consideration and object of the loan given by the respondent to the appellants were such of a nature that if I permitted would defeat any law contrary to the provision of *s 24(b) of the Contracts Act 1950* ('the Contracts Act'). Learned counsel for the appellants contended that the 'in pari delicto ' rule applies to this case in that the respondent would not be able to assert the rights under the financing agreement without showing that it was entered into to finance the purchase of the apartments under the SPA which the appellants had alleged as being illegal and to which the respondent itself was a party.

With respect, we could not agree with the appellants' contention. We find that the appellants and the respondent in the first place did not have any intention to advance any unlawful purpose. The respondent has not acted in pari delicto as alleged by the appellants. Consequently, the provision of s 24 of the Contracts Act in our view does not apply.

[27] It is to be noted there is no illegal object or consideration under the financing agreement. It strains credulity to suggest that the consideration or object of a loan facility to advance money to the appellants to enable them to purchase the apartments is unlawful. This is unlike providing financing for the purchase of illegal drugs or illegal arms. The object or consideration of the SPA for the sale and purchase of the apartments is also not unlawful. In *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] 1 CLJ 347; [1984] 1 CLJ Rep 181, Salleh Abas CJ (Malaya) (as he then was) considered the application of *s 24 of the Contracts Act* and at p 186 held:

In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of section 24 quoted above, although the appellant may contravening Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970.

[28] On the applicability of the provision of *s 24(b) of the Contracts Act* to the present case the learned judge of the High Court had rightly summed up at para 30 of his judgment as follows:

It is clearly repugnant to good reason and common sense to find a cause of action based purely on the assertion that the banks were expected to know of those alleged irregularities and should therefore be stopped from enforcing their rights under the loan agreements. I would agree entirely with the submission of counsel for the banks that the consideration and object of the loan given by the banks to the plaintiffs were clearly not of such a nature that, if permitted, would defeat any law contrary to *s 24(b) of the Contracts Act 1950*. (Emphasis added.)

[65] As the sale was to help the plaintiffs' late father to settle the loans, the sale was not to infringe s 17 of the Land Ordinance of Sabah. We found that the appellants and the respondents in the very beginning did not have any intention to advance any unlawful purpose.

Are the respondents claim statute barred?

[66] The appellant submitted that the respondents knew that the first and second appellants were purportedly not natives of Sabah sometime in December 2006 and yet did not take any action until 2012, some six years later. The respondents were suing for rescission of the 2001 agreement and they should have filed their action within three years of learning this fact in December 2006. The respondents had also alleged that they were informed by their late father before he passed away in April 2005 that the purchase price had

not been paid in full. The time to file the action was three years from April 2005, which is April 2008. The learned judge had failed to consider these important facts.

[67] The learned judge in his decision had held that the Sabah Land Ordinance on limitation is not applicable because he had ruled earlier that the transfer of the six native lands were illegal. He was of the opinion that a void contract generates neither right nor duty to be enforced in court of law. The issue of period of limitation cannot be invoked where there is no right. The period of limitation is simply a procedural device which bars a right if it is not exercised within a definite period. It is said that it makes no sense for lapse of time to make an act efficacious when it was forbidden under the law. However old it may be, a void act can produce no effect.

[68] The main plank of the appellants' case is that the respondents' action is time barred for failing to file their action within three years when they signed their respective agreements with the first, second, fifth, sixth, seventh and eight appellants.

[69] For this issue, we noted that five of the lands in dispute in this case NT093110439, NT093110411, NT093110457, NT093110448 and NT093021017 were involved in the sales and purchase agreement dated 27 June 2001. The said agreement had been declared to be illegal by the Sandakan High Court after full trial on 19 February 2010. The respondents filed this suit on 7 March 2012. In other words, the respondents only knew of the illegality of the 2001 agreement in 2010 and filed the action to nullify the subsequent transfers and the sublease to the appellant in 2012. Our view is that the respondents' action was not time barred. The learned judge had made a correct decision that the plea of limitation raised by the appellants is misconceived.

Are the respondents entitled to the declarations as they did not come to court with clean hands

[70] On this issue, we agreed with the appellants' submission that the other ten family members did not join this action as they possibly knew that the third appellant had helped their late father in repaying the loans to the bank and that the purchase price had been paid in full to their late father. They have kept their side of the bargain and enjoyed the benefit of the loans being settled. The respondents and their family members had received a benefit and had known that the lands charged to the bank and lands under land applications were sold to the first appellant and to be subleased to the third appellant's company to recover the money used to pay for the purchase price. The respondents' late

father could not settle the bank and the bank would have foreclosed on the lands charged to the bank. Their late father would have lost all the three parcels of lands charged to the bank.

[71] The respondents' claim is mainly for declarations and for certain orders (see para 56 of the amended statement of claim at pp 87–89 of AR (Vol 1). In the case of *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421; [1995] 2 CLJ 846, the court referred to O 15 r 16 of the Rules of the High Court 1980 which provides no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed. And the court held that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. In our view, while O 15 r 16 of the Rules of the High Court 1980 gives the court the jurisdiction to make an unlimited declaratory order, the court in exercising its discretion must act judicially of what right and interest the plaintiff wants the court to declare.

[72] In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651, it was held that remedy of declaration is discretionary in nature. The court can refuse granting a declaration where a plaintiff was guilty of laches, other inequitable conduct, 'cloaked declaration' for a collateral purpose or with an improper motive. The list is not exhaustive.

[73] In the above case, the Court of Appeal had allowed the appeal as the learned judge failed to address his mind on those evidence before him and failed to apply his judicial mind to the relevant principles of law and the court could interfere with his decision.

[74] The appellants submitted that in this case, the learned judge failed to address his mind on the 2001 agreement where full consideration had been paid and the fresh documents were just to carry out and complete the sale of the lands as the loans to the bank were settled and the bargain reached be honoured by the parties.

[75] The learned judge had found that 2001 agreement is null and void and also based on the 2010 decision by the Sandakan High Court which had declared the said agreement is null and void. This was done after examining the facts in this case in the full trial. It must be remembered that in this case, the learned judge was dealing with the 2007 agreement that the respondents sought to declare the said agreement as null and void. The respondents in their amended statement of claim had pleaded the illegality factor of the 2001 agreement to declare the 2007 agreement is null and void. The learned judge

had considered this fact and after hearing the evidence from witnesses he granted the declaration to the respondents. By granting the declaration, he had exercised his discretion upon finding the declaration sought was not frivolous or for some other collateral purpose.

[76] The *Sakapp Commodities*' case had referred to *Trawnik and another v Ministry of Defence* [1984] 2 All ER 791 and *Everett v Griffiths* [1924] 1 KB 941 at p 960 where declaration would be refused if the declaration is for a collateral purpose or with an improper motive. In fact, the appellants had in their submission submitted that the agreement was merely for the purpose to help the late Nasry to settle the loan and not for any illegal purpose. The respondents had the right to bring an action to declare the agreement was for illegal purpose and is null and void. We did not find that the respondents was guilty of laches or delay in commencing this action as ground to refuse respondents claim for declarations. Therefore, we failed to see how it can be said that the respondents did not come to court with the clean hands and that the claim for the declaratory relief should be refused.

[77] Our decision here is mainly concern on the appellants' appeal against the learned judge decision granting the declaratory relief to the respondents to declare the 2007 agreement as null and void. It does not concern the 2001 agreement which had been declared as null and void.

Are the respondents parties to an illegal transaction and therefore the loss lies where it falls?

[78] The appellants submitted that if the court should find that the arrangement between the first appellant was illegal, then the respondent were also parties to an illegal act. Their late father and they had taken part in an illegal act by selling their lands to a non-native in 2001. In other words, learned counsel for the appellants contended that the 'in pari delicto' rule applies to this case in that the respondent would not be able to assert the rights under the sale and purchase agreement.

[79] With respect, we could not agree with the appellants' contention. As alluded to earlier, the agreement was merely for the purpose to help the late Nasry to settle the loan and not for any illegal purpose. We find that the appellants and the respondent in the first place did not have any intention to advance any unlawful purpose. The respondent has not acted *in pari delicto* as alleged by the appellants.

[80] In any event, the said lands had been transferred to the fifth to eleventh appellants who are the Native of Sabah. Section 17 of the Land Ordinance does not apply.

CONCLUSION

[81] In the result, we unanimously allowed the appellants' appeal with costs of RM55,000 subject to the payment of allocator fee and deposits to be refunded to the appellant.

Appeal allowed with costs.

Reported by Ashok Kumar